(17)

Office - Supreme Court, U. S.
FILED
AUG 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term—1943.

No. 287

DAVID LOWENSTEIN,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES B. HALLEY,
Counsel for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

	PAGE
Petition	1
Summary Statement of Matter Involved	1
Questions Presented	3
Reasons Relied on for the Allowance of the Writ	3
Brief in Support of the Petition	7
Opinions of the Court Below	7
Grounds Upon Which the Jurisdiction of This Court Is Invoked	7
Statement of the Case	8
Specifications of Errors	8
Summary of the Argument	9
Argument	10
I.—Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes established by the evidence	10
II.—The trial court's concededly obscure charge and its erroneous refusal to accept requests to charge were substantially prejudicial to the rights of petitioner and cannot be assumed to be harmless error	12
III.—The petitioner was deprived of his liberty without due process of law by	13

PAGE

A. The Government's use on appeal of a different theory from the one on which the case was tried in the court below .. 13

B. The Trial Judge's conduct throughout the course of the trial and the United States Attorney's prejudicial comments 15

IV.—Petitioner's sales of lead wash, even though he may have suspected that it might be put to illegal use, is insufficient ground on which to sustain a verdict of guilt 19

Conclusion 20

Appendix A 21

Appendix B 21

Appendix C 22

Appendix D 22

CASES CITED.

	PAGE
Berger v. U. S., 295 U. S. 78 (1935)	9, 10
Betts v. Brady, 316 U. S. 455, 462	15
Bruno v. U. S. 308 U. S. 287	5, 12
Fillippon v. Albion Vein Slate Co., 250 U. S. 76	5
Fort Dodge Hotel Co. v. Bartelt, 119 Fed. 2nd, 253, 259	5, 12
Hickory v. U. S., 160 U. S. 408	5
Keller v. Brooklyn Bus Corp., 128 Fed. 2nd, 519	4
McCandless v. U. S., 298 U. S. 342, 347-348	4, 12
Starr v. U. S., 153 U. S. 614	5
United States of America, Appellee v. Jack Liss, et al., Appellants	6
U. S. v. Falcone, 311 U. S. 205	10, 19
U. S. v. River Rouge, 269 U. S. 411	5

STATUTES CITED.

Judicial Code of the United States, Title 28 U. S. Code, Section 347, Subdivision a (Judicial Code, Section 240a as Amended)	21
Constitution of the United States, Amendment V	21
Chapter 28, U. S. C. A., Section 391	22
Title 26, U. S. Code, Section 2551a	22

IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

DAVID LOWENSTEIN, *Petitioner,* AGAINST UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, David Lowenstein, respectfully represents the following:

I.—Summary Statement of Matter Involved.

Petitioner was convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment, (R. 4-11) charging him and others with having conspired to violate the provisions of the Internal Revenue Code regulating the sale and dispensing of narcotic drugs.

Petitioner, David Lowenstein, was sentenced to serve a term of three months and to pay a fine of $200 (R. 817). *Petitioner served his full prison term and paid the full amount of his fine.*

Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds.

The Circuit Court in a majority opinion (R. 898-910) by Mr. Justice Hand, concurred in by Mr. Justice Swan, affirmed the conviction as to all the appellants except Palmer, Geffner, and Jaffe. Mr. Justice Frank, in a separate opinion, dissented and held for reversal of the conviction and the dismissal of the indictment as to all the defendants except Liss and Conte.

Upon motion for re-argument made by the appellant, David Rudy, the Circuit Court of Appeals reversed the verdict of conviction as to Rudy in a *per curiam* opinion (R. 932).

The Circuit Court of Appeals in the majority opinion divided the alleged conspiracy into three separate conspiracies, to wit: 1st. The attempted synthesis of morphine which they decided was not illegal and which they disregarded (R. 900); 2nd. The extraction of the narcotic base from certain exempt preparations of limited narcotic content which they decided failed and was abandoned (R. 900); 3rd. The attempted diversion of opium by the circuitous circulation of lead and opium wash which the Court decided was not proved (R. 900-901). The Circuit Court of Appeals however, proceeded to affirm the conviction by holding that the Government did not attempt on appeal to sustain the conviction on the latter theory but on the theory that the Government had proved a conspiracy to evade the regulations governing the sale of preparations of limited narcotic content, Section 2551-a Title 26, U. S. Code (R. 901). Mr. Justice Frank in a dissenting opinion held that the variance between the single conspiracy set forth in the indictment and the proof

of three separate conspiracies coupled with the obscure and unenlightening charge of the trial court was substantial error (R. 910-913).

II.—Questions Presented.

I.—Whether the proof of several distinct conspiracies instead of the single one alleged, and the submission of multiple and complex issues involving numerous defendants prejudiced the consideration of petitioner's case by the jury and constituted fatal variance.

II.—Whether the Trial Judge's obscure charge and his refusal to accept requests to charge, conceded to be error by the Circuit Court of Appeals, were substantially prejudicial to petitioner under Section 269 of the Judicial Code as amended (Chapter 28, U. S. C. A., Section 391) and must, therefore, be presumed to be harmful.

III.—Whether the petitioner has been deprived of his liberty without due process of law by reason of

(a) the Government's substitution of an entirely new theory of guilt for the first time on appeal.

(b) The prejudicial manner of the trial Judge in and during the conduct of the trial and the prejudicial remarks of the United States Attorney.

IV.—Whether a retail druggist can be convicted as a co-conspirator merely because he suspected the legality of certain sales of exempt preparations without proof that he had any knowledge of the existence of the conspiracy or that he in any way had a stake in its outcome.

III.—Reasons Relied on for the Allowance of the Writ.

I.—This case involves an important question affecting the law of criminal conspiracy. The evidence showed, and

it was conceded by the Circuit Court, that the Government proved three separate conspiracies instead of the single conspiracy set forth in the indictment (R. 900). This petitioner was admittedly not connected in any way with either the first or second conspiracies. The Circuit Court in violation of its own concessions that three separate conspiracies existed held that this was not a harmful variance and affirmed the conviction. Petitioner contends that the trial court's admission of evidence as to three separate conspiracies was reversible error since it could be used cumulatively against any of the defendants, especially since both the Trial Court and the Circuit Court conceded that the first conspiracy, to wit: the attempted synthesis of morphine was not illegal; that the second conspiracy, to wit: the attempted extraction of the narcotic base from preparations of limited narcotic content failed and was abandoned; and that the third conspiracy, to wit: the attempted diversion of opium by the circuitous circulation of lead and opium wash was never proved. The Circuit Court's admission of such variance therefore warranted a reversal of conviction. Petitioner believes that the holding of the Circuit Court seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

II.—There is a diversity of opinion between the Circuit Courts of Appeals for the Second Circuit and the Eighth Circuit as to whether or not conceded error should be presumed to be harmless and therefore disregarded as not substantially prejudicial. The Second Circuit seems to be disinclined to follow the trend initiated by the Supreme Court in the case of *McCandless* v. *U. S.*, 298 U. S. 342, 347-348. In the case at Bar, the Second Circuit seems to hold that the modern disposition is to assume that error has been harmless. (Also see *Keller* v. *Brooklyn Bus Corp.*, 128 Fed. 2nd, 519.) The Eighth Circuit in *Fort*

Dodge Hotel Co. v. *Bartelt*, 119 Fed. 2nd, 253, 259, holds that error to the substantial rights of a party is grounds for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. The Supreme Court has likewise similarly held in many cases. *Bruno* v. *U. S.*, 308 U. S. 287; *U. S.* v. *River Rouge*, 269 U. S. 411; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76.

III.—The Circuit Court of Appeals for the Second Circuit has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court in that the Circuit Court of Appeals has affirmed a judgment of conviction and sentence of imprisonment wherein, tested by an appraisal of the decisions in *Hickory* v. *U. S.*, 160 U. S. 408; *Starr* v. *U. S.*, 153 U. S. 614, and innumerable other Supreme Court decisions, the petitioner was deprived of his liberty without due process of law.

IV.—This case involves another important question affecting the law of criminal conspiracy which was decided by the Circuit Court of Appeals in a way probably not in accord with applicable decisions of the Supreme Court. The evidence showed that petitioner was a retail druggist who sold a small quantity of lead wash to one of the other defendants. There is no proof that petitioner knew of the existence of an illegal conspiracy or of the unlawful purpose to which the lead wash might be applied. The Circuit Court sustained petitioner's conviction on the ground that he must have suspected that there was something unlawful about it. Petitioner contends that the Circuit Court erred in holding that mere suspicion of the unlawfulness of the use to which the lead wash might be put was sufficient to sustain a conviction. Petitioner believes that the holding of the Circuit Court seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

Wherefore, your petitioner prays that writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit directing said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, calendar #223, *United States of America, Appellee* v. *Jack Liss, et al., Appellants,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated: August 20, 1943.

DAVID LOWENSTEIN,

By CHARLES B. HALLEY,
Counsel for Petitioner.